

UNITED STATES COURT OF APPEALS

June 1, 2005

TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID WARREN VEREN,

Defendant-Appellant.

No. 04-1309

(D.C. No. 04-S-1405)

(D. Colorado)

ORDER

Before **EBEL**, **McKAY**, and **HENRY**, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2)(c); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This is a *pro se* 28 U.S.C. § 2255 prisoner appeal. Defendant pled guilty to violation of probation. He was sentenced to twelve months and one day in prison plus a four-year term of supervised release. Subsequently, Defendant filed a § 2255 motion to vacate, set aside, or correct this sentence with the district court for the District of Colorado. In his motion, Defendant alleged (1) his conviction on his predicate offense was not final, (2) his sentence was illegal, (3) his rights

were violated by federal authorities pursuant to Fed. R. Crim. P. 5, and (4) his probation officer's statements in the presentence report prejudiced him because they deliberately misled the court.

The district court, in a detailed opinion, denied Defendant's motion finding no merit to any of his claims. The district court declined to grant Defendant a certificate of appealability. Defendant has renewed his request for a certificate of appealability with this court. The issues he raises on appeal are identical to those brought before the district court.*

In order for this court to grant a certificate of appealability, Defendant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, Defendant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

We have carefully reviewed Defendant's brief, the district court's disposition, and the record on appeal. Nothing in the facts, the record on appeal,

*As an additional matter, Defendant raises a constitutional challenge to Colo. Rev. Stat. § 18-18-412.5 and Colo. Rev. Stat. § 18-18-405(1)(a). However, we decline to exercise our discretion to consider this issue because Defendant failed to raise it below. *In re Walker*, 959 F.2d 894, 896 (10th Cir. 1992).

or Defendant's filing raises an issue which meets our standards for the grant of a certificate of appealability. For substantially the same reasons as set forth by the district court in its July 30, 2004 Order, we cannot say "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Id.*

We DENY Defendant's request for a certificate of appealability and DISMISS the appeal. Defendant's motion to appeal *in forma pauperis* is GRANTED.

Entered for the Court

Monroe G. McKay
Circuit Judge